

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP375-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2015CF476

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGEL L. CARTAGENA,

DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Angel L. Cartagena appeals from a judgment of conviction and an order denying his postconviction motion. He contends that the

circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claims without first holding a hearing. We reject Cartagena's argument and affirm the judgment and order.

¶2 In 2002, a woman named M.J. reported being sexually assaulted by a stranger while she was walking home from a friend's house in the early morning hours. M.J. went to a hospital, where she underwent a sexual assault examination. A nurse collected sperm from M.J.'s vagina and packaged it into a sexual assault kit. The kit was then submitted to the state crime lab, where a DNA profile was created and entered into a database. No match for the DNA profile was found at that time.

¶3 Over ten years later, the state crime lab found a match between the DNA profile and a DNA sample taken from Cartagena when he was convicted of an unrelated felony. To confirm the match, the lab created a new DNA profile from M.J.'s sexual assault kit, and Cartagena submitted a new DNA sample. After the match was confirmed, the State charged Cartagena with second-degree sexual assault. The matter proceeded to trial.

¶4 At trial, the responding officer, David Rybarik, testified on behalf of the State. He recalled meeting M.J. at the hospital and asking her what happened. According to Rybarik, M.J. said she was walking home from a friend's house when a half white, half Hispanic man came up behind her and knocked her to the ground. The man ordered her to take off her pants. M.J. attempted to run away, but the man knocked her down again. He then removed her pants and underwear and penetrated her vagina. After he ejaculated, M.J. ran to a nearby house to try to summon help. No one answered. M.J. then returned to the location of the assault,

collected her clothes and a jacket the man had left behind, and began walking home. She later went to a hospital for treatment.

¶5 Rybarik testified that he also spoke to two witnesses who lived near the scene of the assault. According to Rybarik, the first witness told him that her daughter had reported seeing a female banging on her window. The second witness recounted a similar event. She said that, upon hearing a scream in the early morning hours, she looked outside and saw a half-naked female banging on the window of a nearby house. Eventually, the female gathered some items, got dressed, and walked away. Afterwards, the witness observed a gray van circling the block. The van contained two Hispanic males, who appeared to be looking for something.

¶6 Finally, Rybarik testified that he remembered the case well despite the passage of time and the fact that he had responded to approximately fifty other sexual assault reports. He explained:

[Y]ou remember certain cases in your career, and I remember this one. Because I remember [M.J.]. I remember the day that it happened. I remember going to check the neighborhood. I remember the story. I remember the lumps on her head. I can't say why I specifically remember this one, but I do remember this case.

¶7 In addition to Rybarik, the State presented testimony from M.J. herself, the nurse who examined M.J. at the hospital, the officer who collected DNA from Cartagena, and a DNA expert. The defense did not present any witnesses, and Cartagena did not testify.

¶8 Ultimately, the jury found Cartagena guilty of second-degree sexual assault. The circuit court sentenced him to twenty years of initial confinement and ten years of extended supervision.

¶9 Cartagena subsequently filed a postconviction motion raising various claims of ineffective assistance of trial counsel. The circuit court denied the motion without a hearing. This appeal follows.

¶10 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court need not address both prongs of the analysis if the defendant makes an insufficient showing on either one. *Id.* at 697.

¶11 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). However, a defendant is not automatically entitled to a hearing upon filing a postconviction motion that alleges ineffective assistance of counsel.

¶12 To earn a hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. *Id.* If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. *Id.* We review the court's

discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

¶13 On appeal, Cartagena contends that the circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claims without first holding a hearing. He renews the claims made in his postconviction motion, which center on his trial counsel's failure to object to Rybarik's testimony. Cartagena complains that the testimony contained inadmissible hearsay statements from M.J. and the two scene witnesses. Cartagena further complains that Rybarik improperly bolstered M.J.'s credibility by saying that he remembered the case well.

¶14 We need not address whether Cartagena's trial counsel was deficient for failing to object to Rybarik's testimony. That is because we are not persuaded that Cartagena has shown that it prejudiced his defense. We reach this conclusion for two reasons.

¶15 First, the objected to testimony was relatively inconsequential. Any harm in the admission of M.J.'s statement was mitigated by the fact that she later testified at trial.¹ Likewise, any harm in the admission of the two scene witnesses' statements was mitigated by the fact that they did not observe the assault and could not identify the perpetrator. As for Rybarik's statement that he remembered the case well, there was nothing improper about it. Indeed, it may have been

¹ Cartagena's trial counsel attempted to undermine M.J.'s credibility by pointing out inconsistencies between her original statement to Rybarik and what she testified to at trial. Thus, Cartagena arguably benefited from the admission of M.J.'s statement.

necessary for the jury to understand why he could testify about the case nearly a decade later.

¶16 Second, and more importantly, the evidence against Cartagena was overwhelming. M.J.’s identification of Cartagena as the assailant was supported by the DNA evidence linking him to the sperm found in her body. Meanwhile, M.J.’s testimony that she did not consent to the encounter was supported by her immediate call to police as well as the various injuries she suffered. Rybarik recalled observing several injuries on M.J., including “scrapes and marks [on] her hands, her shoulders,” and “lumps on the back of her head.” The nurse who examined M.J. noted similar external injuries as well as redness and swelling in M.J.’s vaginal area.

¶17 Because the record conclusively demonstrates that Cartagena’s defense suffered no prejudice from the alleged deficient performance of trial counsel, we are satisfied that the circuit court properly denied his claims without first holding a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

